EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(3)

Supreme Court, U.S.
FILED
DEC 13 1999
OFFICE OF THE CLERK

No. 99-863

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

DON PRINCE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

DON PRINCE, pro se
REG. NO. 95186-071
UNIT WAKE - A
LSCI
POST OFFICE BOX 999
BUTNER, NORTH CAROLINA
27509-0999

38 pp

TABLE OF CONTENTS

Appendix	Page(s)
A. Opinion, U.S. v Prince, No. 97-4329 (4th Cir. 1997)	A-1 thru A-15
B. Decision denying petition for rehearing, U.S. v Prince, No. 97-4329 (4th Cir. 1997). .	B-1
C. Judgment, U.S. v Don Prince, No. CR-96-122, (D.S.C. 1997)	C-1 thru C-6
D. Trial Transcript Excerpts, July 13, 1996 . .	D-1 thru D-2
E. TRial Transcript Excerpts, July 15, 1996 . .	E-1 thru E-3
F. Trial Transcript Excerpts, July 15, 1996 . .	F-1 thru F-9

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 97-4329

DON PRINCE,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

No. 97-4334

ROGER DEWITT PRINCE, a/k/a Bill Prince, a/k/a Ike Davis,
Defendant-Appellant.

Appeals from the United States District Court for the District of South Carolina, at Columbia. Joseph F. Anderson Jr., District Judge. (CR-96-122)

Argued: June 8, 1999

Decided: July 20, 1999

Before MURNAGHAN, LUTTIG, and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

APPENDIX A

COUNSEL

ARGUED: Jack Bruce Swerling, Columbia, South Carolina, for Appellants. John Michael Barton, Assistant United States Attorney, Columbia, South Carolina, for Appellee. **ON BRIEF:** Jack W. Lawson, Florence, South Carolina, for Appellant Roger Prince. J. Rene Josey, United States Attorney, Scarlett Wilson, Assistant United States Attorney, Columbia, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

A jury convicted two brothers, Don Prince and Roger Dewitt ("Bill") Prince, of conspiring in a murder-for-hire scheme directed at killing two persons expected to testify against Bill in connection with an earlier contract murder. Both brothers appeal, asserting that numerous errors require reversal of their convictions and sentences. Finding no reversible error, we affirm.

I.

In 1992, a South Carolina state court tried and convicted Bill Prince, along with Charlie Dorn Smith, of conspiracy and solicitation of the murder of Bill's foster father, Billy Graham. Evidence at that trial showed that Prince and Smith hired a man to kill Graham to eliminate their $259,000 debt to him and to collect on a $500,000 life insurance policy on Graham. Frederick "Peaches" Andrews testified as to Prince and Smith's involvement in Graham's murder.

Prince and Smith appealed their convictions; Prince remained free on bond during the appeal period. The South Carolina Supreme Court reversed Smith's conviction, but affirmed Prince's. Shortly thereafter,

Prince learned he had cancer. He petitioned for rehearing, but the court denied that petition on August 26, 1994. Rather than turning himself in the Monday after the petition for rehearing was denied, Bill Prince left town and remained a fugitive until his capture almost a year later.

Don Prince, Bill's brother, helped Bill evade law enforcement during the year that Bill was a fugitive. Don brought Bill, who was very ill, back to the United States from Puerto Rico, visited Bill, kept in telephone contact with Bill, ran Bill's businesses for him, arranged doctor's appointments for Bill, and found places for Bill to live. When Don's ex girlfriend learned of Don and Bill's scheme to keep Bill out of jail, Don threatened her to keep her quiet. Don worked with Bill's lawyers on new trial motions and post conviction relief; he attempted to obtain sworn affidavits to assist in these efforts. Don testified at trial, admitting that he assisted Bill in these ways while Bill was a fugitive but explaining that he did so because he loved his brother and wanted to help him during his sickness. Don also testified that he frequently urged Bill to turn himself in.

After state authorities arrested Bill in August 1995, Don, who lived and worked in North Carolina, frequently visited Bill in prison in South Carolina. Don continued managing Bill's affairs and continued to attempt to acquire affidavits in an effort to obtain a new trial for Bill. Don testified to talking to T. Cross, who told Don that he could obtain an affidavit from Peaches Andrews recanting his testimony in the Billy Graham trial. Don had an affidavit prepared and gave it to T. Cross, but Andrews never signed the affidavit. Don also testified to his attempts to obtain an affidavit from Charlie Dorn Smith, who had given an affidavit in 1991 that was helpful to Bill; Don believed that Smith would sign another more detailed affidavit. Don visited Smith and had one of the attorneys and others talk to Smith; Smith, however, did not sign the affidavit. In addition, Don obtained statements from some twenty other witnesses. Various attorneys confirmed that they worked with Don to obtain the affidavits to provide grounds to obtain a new trial for Bill.

In late summer while imprisoned, Bill told Don that he had a friend, a former fellow inmate in state prison, Scott Sherpinskas, who could get the Andrews and Smith affidavits signed. Actually, Sherpin-

skas was an FBI informant. After talking with Bill, Sherpinskas contacted Special Agent Rob Waizenhofer telling him that Bill and Don Prince wanted to hire someone to kill Peaches Andrews and Charlie Dorn Smith. According to Sherpinskas, he and Bill Prince began discussing the contract murders of Andrews and Smith in October 1995. Bill wanted to murder Smith because he believed that Smith had orchestrated the lawsuit that Bill's son, Dewitt, had recently filed to obtain control of his father's business. Bill presumably wanted to kill Andrews because of his testimony in Bill's first trial and his subsequent unwillingness to recant. Bill came up with the idea of having Andrews killed, with Dewitt and Smith's murders to follow. After more thought, Bill decided not to kill Dewitt but to have him framed for possessing heroin in hopes of distracting him from pursuing the lawsuit. Bill assured Sherpinskas that his brother Don would travel from North Carolina to pay Sherpinskas's hit man in South Carolina. Bill also told Sherpinskas that his brother Don was going to find someone else to commit the murders if Sherpinskas could not find someone to do it.

As proof of the Princes' murder-for-hire plot, the Government presented another witness, George Thomas Young, who was imprisoned with Bill Prince during the Fall of 1995. (Young did not know of the plot with Sherpinskas and Sherpinskas did not know of the plot with Young.) Young testified that Bill asked him to arrange to murder Andrews and Smith after Young got out of jail on December 1, 1995, in exchange for a pay-off from Don. Bill gave Young maps to Smith's girlfriend's house as well as to Andrews' house and explained that Don would help Young find the houses and would pay Young for the murders. Don acknowledged that Bill introduced him to Young as a "friend," while Young was still imprisoned, but Don disclaimed all knowledge of the two murder plots.

Upon Young's release from prison, Don, after traveling from North to South Carolina, met with Young and showed him the residences of Smith's girlfriend and of Andrews. Don paid Young approximately $2,000 and gave him telephone charge cards to use for calling Don. Don admitted giving the money and telephone cards to Young at his brother's request, explaining that his brother Bill was extremely generous and often told him to distribute or send money to inmate friends. Using the charge cards, Young frequently contacted Don dur

ing Young's first week of release, and Don telephoned Young on at least one occasion. According to Young, he also met with Don to discuss the murder plots on December 7. Young's wife and a neighbor corroborated the fact that Young met with Don and that Young had a map of Smith's girlfriend's house. The evidence showed that Young accurately described the homes of Peaches Andrews and Smith's girlfriend.

On December 8, 1995, Sherpinskas pretended that he had arranged to have a hit man murder Andrews and showed Bill a staged photograph depicting the dead body of Peaches Andrews. Bill negotiated with Sherpinskas as to the amount owing for Andrews's murder and the down payment for Smith's murder. Bill assured Sherpinskas that Don would make the payments to Sherpinskas's chosen hit man. Bill and Sherpinskas came up with the code word "Turbeville" for Don to use so that the hit man would know and recognize Don.

When Don arrived at the prearranged location, a rest stop area off Interstate 20, he asked the hit man (actually undercover FBI Agent Bruce Otterbacher who taped their conversation), "You don't know how to get to Turbeville, do you?" Don and Otterbacher discussed the payoff and Don told him to get rid of the envelopes that contained the $5,000 payoff. Otterbacher asked Don if he had seen the newspaper story reporting the disappearance of Peaches Andrews and Don told him that he had been called earlier that morning about the article. Otterbacher talked about the "first deal" and the "second one." Don told the agent "he wants you to hold off on the second one." The agent replied, "he doesn't want me to do Smith?" Don answered, "no, he wants you to hold on it . . . he wants everything on hold" because "things are buzzing about this." There was a mix-up regarding the payments and the agent asked Don when he could talk to his brother Bill and clear the matter up. Don demurred, explaining, "I don't like to talk a lot to him on the telephone because when he was on the run all my lines were bugged . . . and they still may be."

After Don paid the agent, law enforcement officers arrested him. The police reported that Don then stated in a disgusted voice, "The things you would do for your brother." In the weeks after Don's arrests, the Government obtained search warrants for Don's office,

home, boat, and car. The Government introduced at trial several incriminating letters and documents obtained from those searches.

The brothers (mostly Don) lodge numerous arguments as to why their convictions must be reversed.

II.

Both brothers initially object to the district court's refusal to redact a tape recording and transcript of a conversation between Bill and a Government informant in order to omit Bill's use of the word "niggers." They rightly note that this pejorative word had no probative value and was likely to be prejudicial to them.

The Government suggests that the district court offered to allow the defense to use its own version of the transcript, which lacked the epithet. But in fact, the court offered only to allow the admission of the defendant's transcript in addition to the transcript prepared by the Government, which did contain the epithet. As the district court observed, this approach would almost certainly have had the effect of making the epithet more conspicuous, and thus the brothers' refusal to agree to it cannot be considered a rejection of a solution to the problem.

The Government also suggests that redaction is unnecessary in this case because the epithet was isolated, redaction would have delayed the trial, and the defense had failed to seek redaction before trial even though it had access to the tape for several weeks. The primary reason the defense failed to request redaction earlier, however, appears to be that its transcript of the tape never included the word. Although at trial the Government asserted that redaction would take "all afternoon," that statement seems to have been based primarily on its concern that new transcripts would have to be made, and the district court indicated that new transcripts could be made quickly and easily. Accordingly, we find the Government's argument that the epithet was properly admitted because redaction would have caused unjustifiable delay unpersuasive.

However, we believe that the error in failing to redact the statement was harmless because of the district court's careful jury instruction.

"We generally presume that a jury will follow cautionary instructions regarding potentially prejudicial evidence." United States v. Love, 134 F.3d 595, 603 (4th Cir. 1998). The district court instructed the jury not to allow the offensive language in the tape influence its conclusions. This instruction was sufficient to eliminate the relatively mod est prejudicial effect that this isolated epithet might otherwise have had on the jury.

III.

While in prison, Bill sent a letter to his wife, which contains the following passage:

> Please keep me posted on Pam [Don's daughter] and Scott's kids. I sure hope Jillian will be well soon. I know they are really hurt with everything that is going on. But I hope they will understand that everything is my fault. I will never be able to forgive myself for the problems that I have caused everybody. But if it would be any consolation, I would have done the same for Don.

(Emphasis added). The district court concluded that this letter constituted proper admissible evidence against Bill, but not against Don. Neither of those rulings is challenged on appeal.

What Don does challenge is the district court's refusal to sever his trial from Bill's. Don contends that the emphasized sentence in the letter facially and powerfully incriminates him. For this reason, he asserts that its admission at their joint trial violates the rule established in Bruton v. United States, 391 U.S. 123 (1968). In Bruton, the Supreme Court held that admission at a defendant's trial of the confession of a non-testifying co-defendant, which is"powerfully incriminating" of the defendant, violates the defendant's Sixth Amendment right to confront adverse witnesses. Id. at 135. A cautionary instruction by the trial court cannot cure such a violation and if such evidence is to be admitted against the co-defendant, severance of the defendants' trials is necessary. Id.

Subsequently, in Richardson v. Marsh, 481 U.S. 200 (1987), however, the Court clarified that a jury instruction can prevent or cure a

Sixth Amendment violation where the proffered statement does not expressly implicate the defendant, but only becomes incriminating by virtue of an inference from other evidence. The Court explained:

> Where the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence. Specific testimony that "the defendant helped me commit the crime" is more vivid than inferential incrimination, and hence more difficult to thrust out of mind. Moreover, with regard to such an explicit statement the only issue is, plain and simply, whether the jury can possibly be expected to forget it in assessing the defendant's guilt; whereas with regard to inferential incrimination the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget.

Id. at 208.

The Richardson Court emphasized that the statement at issue there omitted all reference to the existence of the defendant; of course, here, the challenged statement does expressly name Don. Moreover, the Richardson Court rationalized its distinction between "facially incriminating" statements and statements "requiring linkage" by noting that a rule limiting the application of Bruton to the former could be "complied with by redaction - a possibility suggested in that opinion itself." Id. at 208-09. Here, redaction of the last sentence would have entirely remedied the problem; however, neither the parties nor the district judge considered redaction. They only discussed exclusion of the entire letter, severing Don's trial from Bill's, or admission of the letter with an instruction that the jury was only to consider it as evidence against Bill. (Don rejected the instruction.)

Thus, the case at hand differs from Richardson. However, Don cannot prevail based on these distinctions because Bruton does not mandate severance unless evidence "powerfully incriminates" a defendant. In Bruton, the co-defendant directly inculpated the petitioner by stating essentially that "we committed the crime." Here, on the other hand, the challenged passage does not powerfully incriminate Don.

To be sure, in light of the evidence presented in this case, a juror could conclude that "the same" Bill would have done for Don referred to the crime charged against Don -- conspiring to murder the witnesses against his brother. Even if all evidence of Don's aid to Bill while Bill was a fugitive was excluded, see infra at 11-12, the Government presented abundant evidence that while Bill was imprisoned, Don visited and telephoned Bill frequently, ran his businesses, and worked feverishly to obtain the affidavits believed necessary for Bill's new trial. Indeed, Don testified at trial and freely admitted to the considerable efforts he made on his brother's behalf.

If Don was, as he claimed, not guilty of the crime charged, Bill might well have especially regretted and so particularly apologized to the family for the fact that Don's innocent assistance to him could be used as circumstantial evidence tying Don to Bill's criminal conspiracy. The statement in Bill's letter is not in any way inconsistent with Don's defense that he extensively assisted his brother but never participated in any murder-for-hire plot. The statement, standing alone, simply does not powerfully incriminate Don.

IV.

Don also challenges the search warrants used by the Government to search his car, home, boat, and office. He contends that the warrants were supported by false information, were not based on probable cause, and were overbroad.

We have carefully examined the affidavits and warrants. We have no difficulty concluding that the affidavits contained no information known by the officers to be materially false. Similarly, those affidavits provide ample probable cause to justify issuance of the warrants.

Some portions of the warrants do, however, contain broad boilerplate language authorizing seizure of every conceivable item without tying these items to the alleged crimes or circumstances of the case. However, the first two categories of "items to be seized" listed in the warrant are specifically identified, i.e."life insurance policies, business transactions, and/or communications involving" Bill, Don, and their allegedly intended victims, and documents"evidencing the fraudulent or illegal acquisition of life insurance policies or the pro-

ceeds thereof." These two categories are certainly described with adequate particularity. See United States v. Fawole, 785 F.2d 1141, 1144 (4th Cir. 1986).

We have held that, in order to avoid the suppression of lawfully seized evidence, a warrant that properly identifies some items "will not be defeated by [other] ambiguous or conclusionary language" so long as the warrant was "sufficiently particularized with respect to the items seized." United States v. Jacob, 657 F.2d 49, 52 (4th Cir. 1981). In other words a court will "sever" the too general portion of the warrant from the sufficiently specific portion. See United States v. George, 975 F.2d 72, 79 (2d Cir. 1992). A search"conducted pursuant to a warrant held unconstitutional in part does not invalidate the entire search [and] only those items seized beyond the warrant's scope will be suppressed." Id. ("'the remedy with respect to any items exceeding the scope of the warrant [is not] invalidation of the search but suppression of those items.'") (quoting United States v. Dunaloy, 584 F.2d 6, 11 n.4 (2d Cir. 1978)).

Don has pointed to no evidence used by the Government at trial that did not fall into the properly identified first two categories of the warrant. The evidence obtained pursuant to the lawful portion of the warrant was rightly admitted, the remainder of the warrant, while too broad, provides no basis for reversal.

V.

Don maintains that the district court erred in admitting, over his objection, evidence of Bill's prior murder conviction; evidence that Bill was a beneficiary of the insurance policies held by the victim of that murder, Billy Graham, and by one of the intended victims of the instant murder-for-hire scheme; evidence that Don helped Bill collect on Graham's policy; evidence that Don helped Bill when he was a fugitive; evidence, including the complaint, of a lawsuit brought against Don by his nephew; and evidence of threats allegedly made by Don against a woman who later testified at trial for the Government. Don asserts that the admission of this evidence violated Federal Rule of Evidence 404(b), in that it simply constituted evidence of bad character with no other legitimate evidentiary purpose, and Rule 403, in that its prejudicial effect outweighed its probative value.

Rule 404(b) permits admission of evidence necessary to prove "motive, opportunity, preparation, plan, knowledge, identity or absence of mistake or accident." United States v. Bailey, 990 F.2d 119, 122 (4th Cir. 1993). Also admissible is evidence of bad acts that arise out of the same series of transactions as the charged offense and is "necessary to complete the story of the crime," United States v. Kennedy, 32 F.3d 876, 885 (4th Cir. 1994), evidence inextricably intertwined with the charged crime, United States v. Chin, 83 F.3d 83, 88 (4th Cir. 1996), or evidence "elicited as part of the groundwork that the government needed to lay to explain to the jury how . . . individuals fit into the operation of [a] conspiracy." United States v. McMillon, 14 F.3d 948, 955 (4th Cir. 1994). It is well established that evidence of these kinds does not implicate Rule 404(b)'s prohibition of evidence admitted solely to demonstrate bad character. See Kennedy, 32 F.3d at 886; Chin, 83 F.3d at 88; McMillon, 14 F.3d at 955.

We fail to see what bearing Bill's murder conviction and his status as a beneficiary of the insurance policies would have on the matter of Don's character, and thus we doubt that this evidence even raises a question under Rule 404(b). The evidence concerning Bill and the insurance policies certainly has no such significance in itself. Assuming that Bill's prior murder conviction could have subjected Don to inferences of guilt or bad character by association, that evidence was plainly admissible as evidence necessary to complete the story of the crime. See Kennedy, 32 F.3d at 885. Similarly, the evidence concerning the lawsuit was properly admitted to illustrate Don's motive and intent to kill Smith. Likewise, Don's threatening statements to his ex girlfriend was evidence of his intent, preparation, plan, and absence of any mistake. Nor did any of this evidence unfairly prejudice Don.

The evidence that Don helped Bill collect on the Graham policy and that Don helped Bill while he was a fugitive, by contrast, should have been excluded. This evidence could have been omitted without adversely affecting a complete presentation of the story of the crime alleged against Don, i.e., conspiracy to murder the witnesses. The assistance Don gave Bill when he was a fugitive manifestly was not part of the same criminal episode as the conspiracy to murder the witnesses; the "criminal episode" surrounding Bill's flight from justice terminated when Bill was captured, and there is nothing to indicate

that Bill planned to murder the witnesses before then. Thus, evidence of Don's assistance to Bill while he was a fugitive was not admissible as evidence of acts constituting "necessary preliminaries" to the conspiracy, acts "inextricably intertwined" with it, acts forming part of a single criminal episode containing the alleged crime, Chin, 83 F.3d at 88, or acts arising out of the same series of transactions, Kennedy, 32 F.3d at 885.

It is difficult to see what probative value this evidence could have had other than to suggest that Don had previously been involved in Bill's unlawful activity, and that Don was therefore likely to have conspired with his brother in the charged conspiracy. The only justifications that the Government offers for this evidence are that it "allowed the jury to fully understand the extent of the conspiracy and the illegal methods used by him and Bill in reaching the goal of their conspiracy," and that it "shows how the Prince brothers established a relationship of trust through their activities and how these events flowered into the charged crimes." Brief of Appellant at 33. The former assertion falsely implies that the prior bad acts were part of the conspiracy alleged, and the latter in effect creates a new exception to Rule 404(b) that would allow a defendant's prior bad acts in conjunction with a co-defendant, whatever their nature, to be admitted in virtually every instance.

In sum, even if this evidence could survive scrutiny under Rule 404(b), it would nonetheless be inadmissible under Rule 403 because its prejudicial effect would outweigh whatever modest probative value it might have. However, even where the trial court abuses its discretion in admitting bad character evidence, such error may be harmless. See United States v. Kenny, 973 F.2d 339, 344 (4th Cir. 1992). In deciding the harmlessness of an error we must determine "whether we can say that we believe that it is 'highly probable that the error did not affect the judgment.'" United States v. Madden, 38 F.3d 747, 753 (4th Cir. 1994) (quoting United States v. Nyman, 649 F.2d 208, 212 (4th Cir. 1980)). In light of the voluminous properly admitted evidence detailed above against Don, we have no difficulty finding that the error here did not affect the judgment and was therefore harmless.

VI.

Don asserts that the district court erred by instructing the jury that "[i]t does not matter whether the interstate travel took place before or after the murder occurred or was supposed to have occurred," because the statute criminalizes interstate travel with an intent that murder "be committed," not interstate travel following a murder.

Don maintains that the meeting in which he gave money to the Government agent occurred after the victim to whom the payment allegedly related, Peaches Andrews, was already believed to be dead. Even if the Government cannot rely on evidence of travel post-murder, a question we need not decide here, this does not assist Don in light of the fact that the Government produced evidence tending to show that Don traveled interstate to further the plan to murder Andrews before he came to believe Andrews was dead. The evidence indicated, for example, that Don could not have believed Andrews was dead prior to December 8, and that Don drove from North to South Carolina on December 1 to meet with an individual concerning Andrews's murder.

VII.

We have carefully reviewed Don's other arguments as to why his conviction must be reversed and find them all meritless. There remains only Don's assertion that the district court improperly enhanced his sentence for obstruction of justice under U.S.S.G. § 3C1.1.

On appeal, Don essentially contends that there was insufficient evidence for the district court to find that he gave false testimony when he took the stand. The district judge made a finding at the sentencing hearing that Don had lied at trial when he testified that the money he gave to the hit man was paid for the purpose of obtaining affidavits to help secure a new trial for Bill. The district court relied heavily on the audio tape of the meeting at the interstate rest area between Don and Agent Otterbacher. Though the court noted that "the parties [on the tape] used guarded language and code words," it also noted that "[i]t was obvious they were talking about something that was somewhat nefarious" and that there was no reference on the tape to any sort

of affidavit. Indeed, the tape contains interchanges between Don and the undercover agent that seem surely related to the plot to murder Peaches Andrews and Smith, not to affidavits. For instance, when Otterbacher complained about the amount of money Don had brought, the following exchange took place:

> Otterbacher: I was supposed to get five thousand for the first deal, okay. That was up front and I was supposed to get five thousand more cut in half and you guys were gonna hold on to half of it for the second one.
>
> Don: Yeah, but [Bill] wants you to hold off on the second one.
>
> Otterbacher: Oh, he doesn't want me to do Smith?
>
> Don: No, no, no, no, no he [Bill] wants to hold on it.
>
> Otterbacher: I thought he wanted him done in a couple days.
>
> Don: No, no, no, no, he wants you to hold him. He wants you to hold on him . . . .

The discussion on the tape in conjunction with the trial testimony of Sherpinskas, who arranged the meeting, convince us that the district court did not commit clear error when it found that Don had lied on the stand about this meeting. Thus there was sufficient evidence to support the district court's obstruction of justice enhancement.

In his reply brief, Don additionally contends that the sentencing judge failed to follow the requirements of United States v. Dunnigan, 507 U.S. 87 (1993). Dunnigan directs that in order to impose an enhancement for obstruction of justice, a court must make a "finding . . . of an obstruction of, or impediment to, justice that encompasses all of the factual predicates for a finding of perjury." Id. at 95. The "factual predicates" consist of at least the main elements of the Court's definition of perjury: falsity, materiality, and intent. See id. at 94. Don contends that in this case the district court found only that Don committed "perjury," and made no specific findings on two of the factual predicates, namely intent to testify falsely and materiality.

Whether the district court's finding was sufficient under Dunnigan presents a close question. However, this circuit has long held that we will not address new arguments raised for the first time in the reply brief. See Hunt v. Nuth, 57 F.3d 1327, 1338 (4th Cir. 1995). Don has thus waived his Dunnigan argument; the obstruction of justice enhancement was not otherwise in error.

AFFIRMED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
August 17, 1999

No. 97-4329
CR-96-122

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DON PRINCE

Defendant - Appellant

No. 97-4334
CR-96-122

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ROGER DEWITT PRINCE, a/k/a Bill Prince, a/k/a Ike Davis

Defendant - Appellant

O R D E R

The appellants have filed a petition for rehearing.

The Court denies the petition for rehearing.

For the Court,

/s/ Patricia S. Connor

CLERK

United States District Court
District of South Carolina

UNITED STATES OF AMERICA

vs.

Don Prince

THE DEFENDANT:

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 3:96-122-2

_Jack Swerling, Esquire, Retained___
Defendant's Attorney

[illegible]INED

FILED
APR 17 1997
LARRY W. PROPES, CLERK
COLUMBIA, S.C.

ENTERED
4/17/97
BW

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

■ was found guilty on count(s) 1, 2 and 3 on July 16, 1996 after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 1958(a)	SEE THE INDICTMENT	12/14/95	1
18 USC 1958(a)	SEE THE INDICTMENT	12/14/95	2
18 USC 1958(a)	SEE THE INDICTMENT	12/14/95	3

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _ is/are dismissed on the motion of the United States.
IT IS ORDERED that defendant pay a Special Assessment of $150.00 whichj shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 243-50-9510
Defendant's Date of Birth: April 5, 1938
Defendant's USM No.: 95186-071

Defendant's Residence Address:
5 Bahama Drive
Wrightsville Beach, N. C. 28406

Defendant's Mailing Address:
5 Bahama Drive
Wrightsville Beach, N. C. 28406

April 15, 1997
Date of Imposition of Judgment

Signature of Judicial Officer

JOSEPH F. ANDERSON, JR., U.S. DISTRICT JUDGE
Name and Title of Judicial Officer

4/16/97
Date

A TRUE COPY
Attest: Larry [illegible]
By: Becky Wilson
DEPUTY CLERK

APPENDIX C

DEFENDANT: Don Prince
CASE NUMBER: 3:96-122-2

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of Two Hundred Eleven (211) Months. This sentence consists of One Hundred Twenty (120 Months, as to Count 1; Ninety-one (91) Months, as to Count 2 which shall run consecutive to sentence imposed in Count 1; and Ninety-one (91) Months, as to Count 3 which shall run concurrently with sentences imposed in Counts 1 and 2.
TOTAL: 211 Months.

This sentence is imposed pursuant to the provisions of Sec. 5G1.2.

■ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:
- ☐ at _ a.m./p.m. on .
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before 2 p.m. on _.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this Judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy United States Marshal

DEFENDANT: Don Prince
CASE NUMBER: 3:96-122-2

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Three (3) Years, concurrent as to each of Counts 1, 2 and 3. TOTAL: 3 YEARS.

. The defendant shall also comply with the additional conditions.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

■ The defendant shall not possess a firearm as defined in 18 U.S.C. §921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Don Prince
CASE NUMBER: 3:96-122-2

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 150.00	$ 5,000.00	$

☐ If applicable, restitution amount ordered pursuant to plea agreement ..... $_____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $__.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 5, Part B, may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g).

■ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

■ The interest requirement is waived.

☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred, until _____. An Amended Judgment in a Criminal Case will be entered after such a determination.

☐ The defendant shall make restitution to the following payees in the amounts listed below.
If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	**Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$_	$_____	

**Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Don Prince
CASE NUMBER: 3:96-122-2

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☐ in full immediately; or

B ■ $150.00 immediately, balance due (in accordance with C, D or E); or

C ☐ not later than; or

D ☐ in installments to commence day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. Probation Officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E ■ $5,000.00 fine to be paid through participation in the Inmate Financial Responsibility Program..

The Defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:
Defendant to participate in the Inmate Financial Responsibility Program for payment of $5,000.00 fine.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are to be made as directed by the court, the Probation Officer or the United States Attorney.

DEFENDANT: Don Prince
CASE NUMBER: 3:96-122-2

STATEMENT OF REASONS

■ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 36

Criminal History Category: I

Imprisonment Range: 188 to 235 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 17,500.00 to $ 175,000.00

■ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $N/A

☐ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. §3663(d).

☐ For offenses committed on or after Sept. 14, 1994 but before April 23, 1996, that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

☐ Partial restitution is ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

■ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): Seriousness of crime as revealed in Presentence Report.

OR

☐ The sentence departs from the guideline range:

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following specific reason(s):

FACILITIES IN ADDITION TO TRAVEL.

MR. MOORE: YOUR HONOR, I THINK IT'S SAFER TO CHARGE IT THE WAY YOU HAVE IT CHARGED. I THINK WE ARE BETTER OFF ARGUING THE TRAVEL, NOT ARGUING THE USE OF INTERSTATE FACILITIES.

THE COURT: I THINK THAT LIMITS YOU TO THE INDICTMENT ANYWAY.

MR. MOORE: IT IS A MORE PRUDENT COURSE OF CONDUCT.

THE COURT: THE SECOND QUESTION REGARDING THE CONSPIRACY COUNTS, THE INDICTMENT ONLY ALLEGES TWO CONSPIRATORS. AND SO I HAVE THE STANDARD CONSPIRACY CHARGE, TELLS THE JURY THAT THE GOVERNMENT MUST PROVE THAT TWO OR MORE PEOPLE FORMED A CONSPIRACY, AND THAT DEFENDANTS, AT SOME TIME, JOINED THE CONSPIRACY, ET CETERA, ET CETERA.

BUT I THINK HERE, I JUST NEED TO SAY THE GOVERNMENT MUST PROVE THAT THE TWO DEFENDANTS FORMED A CONSPIRACY. THERE'S NO ALLEGATION THAT ANYONE ELSE WAS A MEMBER OF THE CONSPIRACY; AM I CORRECT?

MR. MOORE: BEG ONE MOMENT, YOUR HONOR.

(PAUSE IN PROCEEDINGS.)

MR. MOORE: YOUR HONOR, MS. WILSON TELLS ME THE TAPES REFER TO HAVING SOMEONE ELSE GOING TO CHECK ON PEACHY AND CHECK ON PEACHY'S STUFF, SEE IF PEACHY WAS, IN FACT, DEAD.

I THINK --

THE COURT: WHAT ABOUT -- WHAT IS THE LAW ON

GOVERNMENT UNDERCOVER AGENTS? THEY CANNOT BE CONSPIRATORS?

MR. MOORE: THEY CANNOT BE, SO, MR. -- JUST ALL THOSE ARE OUT, THEY CAN'T BE CONSPIRACIES.

MR. MOORE: YOUNG WAS NOT A GOVERNMENT AGENT AT THE TIME HE PARTICIPATED IN THESE ACTS. I GUESS YOU COULD ARGUE IF YOU BELIEVE HIS TESTIMONY IN FULL, YOU COULD BELIEVE THAT HE WAS NOT REALLY A CO-CONSPIRATOR, BECAUSE HE WAS SCAMMING. THE JURY COULD PROBABLY CONCLUDE, HOWEVER, THAT HE WAS A CO-CONSPIRATOR, AND THAT HE WAS TELLING THE TRUTH.

AS YOU KNOW, YOUR HONOR, THE JURY IS FREE TO BELIEVE ALL OR PART OF A WITNESS' TESTIMONY. AND THEY COULD BELIEVE THAT HE REALLY DID COMMIT THESE ACTS, BUT HE REALLY DID INTEND TO HELP THESE GUYS COMMIT THE MURDER. AT SOME POINT MAY HAVE CHANGED HIS INTENTION.

I THINK, YOUR HONOR, YOU SHOULD TELL THE JURY THAT THE GOVERNMENT HAS TO PROVE THAT TWO OR MORE PERSONS, NOT JUST THE DEFENDANTS, BUT TWO OR MORE PERSONS COMBINED TO COMMIT OR CONSPIRED.

THE COURT: THAT'S THE WAY IT READS IN WHAT YOU HAVE BEEN GIVEN. LET ME GIVE THAT SOME MORE THOUGHT. WE'LL TAKE THAT UP LATER.

MR. SWERLING: JUDGE, I POINT OUT THAT THE INDICTMENT IS UNIQUE IN THIS CASE. IT DOES NOT EVEN ALLEGE, AS OTHERS AND MOST INDICTMENTS DO, IT'S ONLY TWO OF THEM ALLEGED.

THE COURT: I NOTICED THAT; YOU ARE RIGHT.

(PAUSE IN PROCEEDINGS.)

THE COURT: MR. SWERLING, I DIDN'T NOTICE THAT.

MR. LAWSON: I SAW HER, I THOUGHT THAT'S WHAT IT WAS, SHE NEEDED TO GO. I THINK SHE WAS TRYING TO EYE SOMEBODY, BUT

THE COURT: I WOULD STOP IF I HAD SEEN HER. LET ME JUST RAISE ONE QUESTION ON THE JURY INSTRUCTIONS, A BOILER-PLATE PAGE THAT SAYS YOU GOT TO CONSIDER EACH COUNT O N EACH DEFENDANT INDIVIDUALLY. AND THERE'S A SENTENCE SAYS THE FACT YOU MAY FIND ONE OR MORE OF THE DEFENDANTS GUILTY OR NOT GUILTY OF ANY OFFENSES SHOULD NOT AFFECT YOUR VERDICT TO ANY OTHER OFFENSE.

WELL, TECHNICALLY, IF THEY FIND GUILT ON COUNT ONE OR TWO, IT'S GOT TO BE AGAINST BOTH DEFENDANTS; RIGHT?

MR. SWERLING: COUNT --

THE COURT: THE CONSPIRACY COUNTS COULDN'T FIND ONE GUILTY, THE OTHER NOT GUILTY ON CONSPIRACY.

MR. SWERLING: THAT WOULD BE MY VIEW.

THE COURT: SO, I THINK THAT SENTENCE MAY NEED TO COME OUT. JUST LEAVE THE CONCEPT A SEPARATE CRIME OR OFFENSE IS CHARGED AGAINST THE DEFENDANTS IN EACH COUNT, EACH OFFENSE. AND THE EVIDENCE PERTAINING TO IT SHOULD BE CONSIDERED SEPARATELY.

ALSO THE CASE OF EACH DEFENDANT SHOULD BE CONSIDERED SEPARATELY AND INDIVIDUALLY, PERIOD. STOP IT RIGHT THERE. AND

DON'T SAY THE FACT THAT YOU MAY FIND ONE OR MORE DEFENDANTS GUILTY ON ANY ONE COUNT SHOULD NOT AFFECT YOUR VERDICT AS TO THE OTHER DEFENDANT.

MR. SWERLING: ISN'T THAT SOMETHING YOU COULD CORRECT AT THE END OF THE CASE, IF THEY CAME BACK WITH A VERDICT ON ONE AND NOT THE OTHER ON CONSPIRACY? I'M RELUCTANT TO LET THE JURY -- RELUCTANT TO TRY AND EXPLAIN THAT TO THEM. BECAUSE IT WOULD BE COMPLICATED.

THE COURT: I NEVER HAD A CONSPIRACY BEFORE THAT WAS CLOSED IN.

MR. SWERLING: I DON'T THINK I HAVE EITHER.

THE COURT: THAT'S THE PROBLEM, CONSPIRACY OTHER ALLEGED MEMBERS IT WOULD BE POSSIBLE TO FIND JUST ONE OF THE TWO DEFENDANTS GUILTY. BUT, MS. WILSON, MR. JOSEY, DON'T YOU AGREE THAT IT IS UP OR DOWN ALL OR NOTHING ON COUNTS ONE AND TWO?

MS. WILSON: YOUR HONOR, I UNDERSTAND WHAT YOU'RE SAYING. BUT I KNOW THAT ALL THE TIME JURIES COME BACK WITH INCONSISTENT VERDICTS. AND THIS COULD BE ONE OF THOSE SITUATIONS. BUT I UNDERSTAND.

THE COURT: I KNOW. I'M TRYING TO MAKE IN ADVANCE PREVENT THAT FROM HAPPENING, IF I CAN.

MS. WILSON: WELL, I THINK THEY HAVE A RIGHT TO HAVE AN INCONSISTENT VERDICT, IF THEY WANT TO.

THE COURT: WHAT DO WE DO -- HYPOTHETICALLY, IF THEY

CONVICT ONE DEFENDANT, NOT THE OTHER ON COUNT ONE.

MS. WILSON: NOTHING.

MR. SWERLING: RULE 29.

MR. MOORE: THEN WE ARGUE ABOUT WHETHER IT IS INCONSISTENT VERDICT, AT THAT POINT. I HESITATE TO PUT THE CART BEFORE THE HORSE.

THE COURT: THAT'S GETTING TOO FAR AHEAD. WHAT DO I NEED TO SAY IN THE CHARGE?

MR. SWERLING: EXPLAIN TO THEM RULE 32.

THE COURT: I THINK IF WE JUST TAKE OUT THAT SENTENCE -- THE SENTENCE I'M CONCERNED ABOUT, LET ME JUST QUOTE IT: THE FACT THAT YOU -- THE FACT THAT -- I THINK PAGE 32 -- I THINK PAGE 32, THE LAST SENTENCE OF THE FIRST PARAGRAPH.

MS. WILSON: THAT'S FINE, YOUR HONOR.

THE COURT: JUST TAKE THAT SENTENCE OUT. WE STILL HAVE THE CONCEPT THAT YOU GOT TO LOOK AT EACH COUNT AND THE EVIDENCE ON EACH DEFENDANT SEPARATELY AND INDEPENDENTLY.

MR. SWERLING: CAN I THINK ABOUT IT?

THE COURT: ALL RIGHT.

(PAUSE IN PROCEEDINGS.)

THE COURT: I JUST LIKE THAT LAST SENTENCE COMING OUT WOULD CORRECT THE PROBLEM. DO WE HAVE AGREEMENT THAT THE ALTERNATES LISTED ON THE LAST PAGE ARE, IN FACT, THE ALTERNATES? I ALWAYS WORRY ABOUT HAVING A LITTLE SNAFOO, WOULD YOU CHECK DOUBLE CHECK.

THE COURT: ALL RIGHT. THE JURY HAS SENT OUT A QUESTION, WHICH READS AS FOLLOWS: IN RELATION TO COUNTS ONE AND TWO REGARDING THE ALLEGED CONSPIRACY, CAN WE RENDER A GUILTY VERDICT FOR ONE DEFENDANT AND/OR A NOT GUILTY VERDICT FOR THE OTHER DEFENDANT?

IT IS A MATTER WE DISCUSSED EARLIER. I THINK THE ANSWER TO THAT QUESTION IS NO.

RIGHT?

I JUST THINK THAT YOU CAN'T CONSPIRE WITH YOURSELF.

MR. SWERLING: JUDGE, AGAIN, I THINK THE POSITION I TOOK BEFORE, I STILL HAVE TO TAKE IT NOW, IS THAT THAT IS SOMETHING YOUR HONOR CAN CURE IN A JUDGMENT TO SET ASIDE THE VERDICT -- MOTION TO SET ASIDE THE VERDICT.

THE COURT: HOW WOULD I CURE IT?

MR. SWERLING: POST-TRIAL MOTION.

THE COURT: BUT I CAN'T CURE SOMEBODY -- SOMEONE WHO HAS BEEN CONVICTED. ONLY WAY TO CURE IT WOULD BE TO SET ASIDE THE CONVICTION OF WHOEVER THEY CONVICTED.

MR. SWERLING: CORRECT, CORRECT.

THE COURT: WELL, I JUST DON'T THINK A JURY SHOULD BE INSTRUCTED IT IS APPROPRIATE TO BRING BACK AN INCONSISTENT VERDICT.

MR. SWERLING: I'M NOT SUGGESTING BRINGING BACK AN INCONSISTENT VERDICT. ALL I'M SUGGESTING IS THAT THEY SHOULD BE REINSTRUCTED WHAT YOU HAD SAID. AND IF SHOULD THEY DO THAT,

THEN YOUR HONOR HAS THE POWER IN POST-TRIAL MOTIONS TO CORRECT IT AS TO IF THERE IS A GUILTY VERDICT AS TO ONE.

THE COURT: WHAT ABOUT FROM THE GOVERNMENT?

MR. MOORE: YOUR HONOR, I AGREE WITH YOUR HONOR. I DON'T THINK THE JURY SHOULD BE INSTRUCTED THEY CAN BRING BACK AN INCONSISTENT VERDICT. I THINK YOU HAVE TO TELL THEM THE ANSWER IS NO.

THE COURT: WELL, SHOULD I GO FURTHER AND SAY THAT IT SAYS A PERSON CANNOT CONSPIRE WITH THEMSELVES? IT TAKES TWO OR MORE PEOPLE TO FORM A CONSPIRACY. IN THIS CASE THE TWO MEMBERS OF THE CONSPIRACY ARE THE TWO DEFENDANTS, AND THOSE TWO ALONE. I MEAN, SHOULD I EXPLAIN THE ANSWER, IN OTHER WORDS?

MR. MOORE: I DON'T HAVE A PROBLEM WITH THAT, JUDGE.

MR. SWERLING: JUDGE, I THINK YOU HAVE IN THE CHARGE.

THE COURT: WELL, I HAVE, THAT'S FOR SURE.

MR. SWERLING: I MEAN, THE CHARGE IS FAIRLY STRAIGHTFORWARD. GOT TO BE TWO OR MORE PEOPLE. ACTUALLY THE CHARGE DOES NOT SAY IT HAS TO BE TWO OR MORE PEOPLE.

THE COURT: IT DOES IN THE LEAD IN, THE LEAD IN, A CONSPIRACY IS KIND OF A PARTNERSHIP OF TWO OR MORE PERSONS TO JOIN TOGETHER TO ACCOMPLISH SOME UNLAWFUL PURPOSE.

I THINK I CAN REPEAT THAT STATEMENT I JUST READ, AND SAY IN LIGHT OF THAT, THE ANSWER TO YOUR QUESTION IS NO. IN OTHER WORDS, I THINK THAT I HAVE THE DISCRETION NOT ONLY TO ANSWER THE SPECIFIC QUESTION THAT IS ASKED, BUT GIVE AN

EXPLANATION AS TO WHY SO THEY WILL UNDERSTAND IT, AND NOT -- I DON'T THINK THERE WOULD BE ANY ERROR IN GIVING A BRIEF EXPLANATION.

SO, OVER THE DEFENDANTS -- MR. LAWSON, YOU HAVE ANY POSITION ON THIS?

MR. LAWSON: YOUR HONOR, I THINK THAT THE APPROPRIATE WAY IS AS YOU DID IN YOUR INITIAL CHARGE, IS TO INSTRUCT THE JURY THAT IN THIS CASE THE CHARGE OF CONSPIRACY AS ALLEGED IN THE INDICTMENT IS A CONSPIRACY CONSISTING OF TWO INDIVIDUALS. AND THAT IF YOU FIND --

THE COURT: WELL, I'M GOING TO GIVE THEM AN ANSWER TO THE QUESTION, GIVE THEM A WATERED DOWN INSTRUCTION ON CONSPIRACY, THAT MAKES IT CLEAR THAT THE CONSPIRACY IS AN AGREEMENT WHICH REQUIRES TWO PEOPLE.

ALL RIGHT.

PLEASE BRING IN THE JURY.

(JURY IN.)

THE COURT: LET ME FIRST ASK WHO FROM AMONGST YOU HAS BEEN SELECTED AS THE FOREPERSON?

THE FOREPERSON: I HAVE.

THE COURT: WHAT IS YOUR NAME?

FOREPERSON: JILL TUCKER.

THE COURT: TUCKER? I'M SORRY. MISS TUCKER AND MEMBERS OF THE JURY: WE RECEIVED IN RELATION TO COUNTS ONE AND TWO, REGARDING THE ALLEGED CONSPIRACY, CAN WE RENDER A VERDICT

FOR ONE DEFENDANT AND/OR A NOT GUILTY VERDICT FOR THE OTHER DEFENDANT?

IN RESPONSE TO THAT, I WOULD SAY THE ANSWER TO THAT QUESTION IS NO. THE REASON FOR THAT ANSWER IS AS FOLLOWS:

YOU WILL RECALL I TOLD YOU IN MY JURY INSTRUCTIONS, A CONSPIRACY IS A KIND OF CRIMINAL PARTNERSHIP A COMBINATION OR A AGREEMENT OF TWO OR MORE PERSONS TO JOIN TOGETHER TO ACCOMPLISH SOME UNLAWFUL PURPOSE.

I ALSO TOLD YOU THAT OF THE FOUR ELEMENTS NECESSARY FOR THE GOVERNMENT TO PROVE BEYOND A REASONABLE DOUBT TO ESTABLISH A CONSPIRACY, THE FIRST OF THOSE ELEMENTS IS THAT THE TWO DEFENDANTS ENTERED INTO THE UNLAWFUL AGREEMENT CHARGED IN THE INDICTMENT BETWEEN ON OR ABOUT OCTOBER FIRST, 1995, AND DECEMBER 14TH, 1995.

THUS, BECAUSE THE ESSENCE OF AN AGREEMENT IS A SITUATION INVOLVES TWO PEOPLE, THE ANSWER TO THE QUESTION YOU HAVE ASKED ME IS NO.

I WOULD ASK THAT YOU NOW RETURN TO YOUR JURY ROOM AND RESUME YOUR DELIBERATIONS.

(JURY OUT.)

THE COURT: ALL RIGHT. OBJECTION FROM EITHER SIDE WHAT I JUST TOLD THE JURY?

MS. WILSON: NONE FROM THE GOVERNMENT, YOUR HONOR.

MR. SWERLING: JUDGE, WHAT I -- I HAVE A PROBLEM WITH NOW, THE JURY DOESN'T HAVE -- THEY HAVE THE ANSWER, BUT THEY

DON'T HAVE ANY GUIDANCE ABOUT IT. BECAUSE IF THEY NEED TO BE INSTRUCTED THAT THE GOVERNMENT HAS ONLY ALLEGED DON AND BILL PRINCE TO BE THE CO-CONSPIRATORS IN THIS CASE. IF THEY FIND THAT ONE OF THEM DID NOT ENTER INTO A CONSPIRACY, THEN THERE IS NO CONSPIRACY.

BUT THE WAY IT WAS EXPLAINED TO THEM, I'M NOT SURE THEY UNDERSTAND WHY. AND, THEREFORE, THEY WOULD HAVE DIFFICULTY --

THE COURT: WELL, YOU WANT ME TO BRING THE JURY BACK AS TO COUNTS ONE AND TWO, THEY ARE BOTH GUILTY OR BOTH NOT GUILTY?

MR. SWERLING: OF CONSPIRACY.

THE COURT: OF CONSPIRACY, COUNT ONE AND TWO.

MR. SWERLING: BECAUSE THE GOVERNMENT HAS ALLEGED THAT THEY WERE THE TWO CONSPIRATORS. IF THEY HAD -- I ALSO LIKE YOUR HONOR TO TELL THEM SOMEHOW THAT THEY ARE NOT CONVINCED BEYOND A REASONABLE DOUBT THAT ONE IS A MEMBER OF THE CONSPIRACY, THEN --

THE COURT: I THINK THAT'S IMPLICIT IN THE WHOLE CHARGE IN WHAT I TOLD THEM.

MR. SWERLING: WELL, THAT'S WHAT I WAS WORRIED ABOUT WHEN YOUR HONOR WAS CHARGING THEM JUST NOW, ISOLATING THAT PORTION OF IT. BUT THEY DON'T UNDERSTAND, AT THIS POINT, I CAN'T IMAGINE THAT THEY WOULD UNDERSTAND WHY BOTH WOULD HAVE THAT -- I DON'T UNDERSTAND, I DON'T THINK THEY UNDERSTAND WHY

THEY CAN'T FIND THEM GUILTY, ONE GUILTY OF CONSPIRACY THE REASON IS BECAUSE THERE'S ONLY TWO PEOPLE.

THE COURT: YEAH, WELL, I DIDN'T TELL THEM WHAT I SAID EARLIER, YOU CAN'T CONSPIRACY WITH YOURSELF. BUT I THINK IT'S IMPLICIT IN WHAT I SAID, IT TAKES TWO PEOPLE -- TWO OR MORE PEOPLE. IN THIS CASE, THE ONLY TWO PEOPLE HAVE BEEN ALLEGED ARE THE TWO DEFENDANTS.

LET ME SAY IN REGARD TO YOUR SUGGESTION THAT WE JUST NOT STRAIGHTEN THEM OUT, TELL THEM THAT, I'LL FIX THE VERDICT IF IT COMES IN INCONSISTENT. I DON'T THINK THAT'S APPROPRIATE WAY TO LOOK AT IT. IF WE, YOU KNOW, FOR EXAMPLE, PICK A DIFFERENT EXAMPLE IN A DIFFERENT CONTEXT, A LOT OF TIMES JURIES COME BACK ASK ME ABOUT PUNITIVE DAMAGES AND WANT MORE GUIDANCE. I WOULDN'T TELL THEM YOU JUST DO WHATEVER YOU THINK IS RIGHT, AND IF IT IS TOO MUCH, I'LL FIX IT LATER. I MEAN, THAT'S JUST NOT THE WAY WE INSTRUCT JURIES.

MR. SWERLING: I WOULDN'T INSTRUCT THE JURY YOU WOULD DO THAT. I THINK IT IS A MATTER OF LAW FOR THE COURT, THE JURY SHOULDN'T HAVE ANY PART OF THAT.

THE COURT: WELL, I'M GOING TO STAND ON WHAT I TOLD THE JURY. I THINK IT ADEQUATELY RESPONDED TO THEIR QUESTION. SO IT IS NOW ALMOST 6:30. LET'S DON'T LEAVE, GO GET DINNER YET. LET'S STICK AROUND FOR ANOTHER 15, 20 MINUTES. AND IF WE DON'T HAVE ANY QUESTION OR VERDICT BY THEN, WE WILL LET YOU GO GET A BITE TO EAT.

THE COURT: ALL RIGHT. WE WILL BE IN RECESS.

MR. SWERLING: JUDGE, COULD YOU -- BEFORE WE GO OFF -- I'M JUST CONCERNED ABOUT THIS ISSUE, IS THERE SOME WAY YOU CAN FASHION -- MAYBE WE CAN FASHION SOMETHING THAT SAYS THAT THAT CONSPIRACY NECESSARILY INVOLVES PROOF BEYOND A REASONABLE DOUBT THAT TWO OR MORE PEOPLE CONSPIRED TO COMMIT AN UNLAWFUL ACT. IF THEY DON'T FIND THAT TWO OR MORE PEOPLE CONSPIRED TO COMMIT AN UNLAWFUL ACT, THEN THE ANSWER TO THAT QUESTION IS --

MR. LAWSON: YOUR HONOR, I THINK IN THIS CASE, WE NEED -- THIS JURY IS CONFUSED IN THAT THE INDICTMENT HAS ONLY ALLEGED TWO CO-CONSPIRATORS. AND I THINK THEY NEED -- THAT NEEDS TO BE POINTED OUT TO THEM. THAT IN THIS CASE IN COUNTS ONE AND TWO, THE GOVERNMENT HAS ONLY ALLEGED --

THE COURT: I THINK THAT IS IN THE CHARGE I HAVE GIVEN THEM.

MR. LAWSON: BUT, I THINK THEIR QUESTION INDICATES THAT THEY DON'T UNDERSTAND THAT.

MR. SWERLING: I THINK THAT'S WHY I SUGGESTED JUST REREADING THE CHARGE NOW THAT YOU HAVE EXPLAINED IT, I THINK WE MAY HAVE CAUSED SOME PROBLEMS.

THE COURT: PAGE 14 OF THE CHARGE, I SAID FOUR ELEMENTS ARE AS FOLLOWS: FIRST, THAT TWO DEFENDANTS ENTERED INTO AN UNLAWFUL AGREEMENT ENTERED IN THE INDICTMENT THE TWO -- SAY TWO OR MORE OR SEVERAL PEOPLE, I SAID THE TWO DEFENDANTS.

MR. SWERLING: THAT'S WHY I THOUGHT THE CHARGE WAS

ADEQUATE.

THE COURT: THAT'S WHAT I JUST GAVE THEM AGAIN WHEN THEY CAME OUT JUST NOW.

MR. MOORE: YOU ATTEMPTED TO ANSWER THEIR QUESTION, YOUR HONOR. AND I WOULD FIRST POINT OUT THAT NEITHER DEFENDANT OBJECTED TO THIS CHARGE AT THE TIME OF IT GIVEN, YOU GAVE THEM AN ANSWER TO THEIR QUESTION, THEY SEEM TO TAKE THAT AS THE ANSWER. THE FOREPERSON IS A PARA LEGAL. I AM SURE THAT IF THEY HAVE ANOTHER QUESTION, THEY WILL SUBMIT IT TO US.

THE COURT: WELL, YOU KNOW, I RAISED THIS ISSUE BEFORE THE CASE WENT TO THE JURY, WHEN WE TALKED ABOUT THAT PAGE 32, YOU KNOW, ON GUILT OR INNOCENCE OF EACH DEFENDANT ON EACH COUNT TO BE JUDGED SEPARATELY. SO IT IS NOT SOMETHING THAT WE DIDN'T THINK ABOUT. I TRIED TO STRUCTURE IT WHERE THAT QUESTION WOULD HAVE BEEN ANSWERED ALREADY. BUT APPARENTLY WE DIDN'T,

MR. SWERLING: I DON'T HAVE ANY PROBLEM WITH THE CHARGE. YOU KNOW, THERE'S NO REASON FOR ME TO OBJECT TO YOUR HONOR CHARGING THE JURY. THERE'S ONLY TWO PEOPLE IN THE CONSPIRACY, THAT'S TO MY BENEFIT. I'M NOT GOING TO GO OBJECT TO THAT. BUT, I DO HAVE A PROBLEM WITH WHAT -- THE WAY THE JURY'S QUESTION WAS FRAMED, OTHER THAN RECHARGING THEM TRYING TO EXPLAIN IT.

BECAUSE NOW I DON'T KNOW THAT THEY UNDERSTAND WHY THEY CAN'T FIND HIM GUILTY.

THE COURT: WELL, YOUR OBJECTION IS NOTED. BUT I THINK I HAVE ADEQUATELY ANSWERED THEIR QUESTION, EXPLAINED THE ANSWER THAT I GAVE TO THEM. SO WE WILL STAND ON THAT. AND WE WILL BE IN RECESS UNTIL FURTHER NOTICE.

THE MARSHAL: ALL RISE.

THE COURT: THE QUESTION READS AS FOLLOWS: WE WOULD LIKE TO VIEW THE VIDEOTAPE OF THE MEETING AT THE REST STOP BETWEEN MR. DON PRINCE AND UNDERCOVER SLED AGENT. WE WOULD ALSO LIKE TO HEAR THE AUDIO TAPE OF THE CONVERSATION BETWEEN MR. BILL PRINCE AND MR. SCOTT SHERPINSKAS.

NOW, THERE WAS A VIDEOTAPE AND AN AUDIO TAPE AT THE REST STOP MEETING. THEY ONLY ASKED FOR THE VIDEOTAPE.

MS. WILSON: THAT'S FINE, WE CAN DISTRIBUTE --

THE COURT: THE VIDEO HAD AUDIO TO IT, BUT IT WAS NOT AS AUDIO AS THE OTHER TAPE; RIGHT?

MS. WILSON: I THINK THAT'S DEBATEABLE. WHEN WE PLAYED THE VIDEOTAPE, YOU COULD PLAY THE AUDIO, WE PLAY IT AS WE PLAYED IT DURING THE TRIAL WITH THE HEADPHONES.

THE COURT: READY TO GO ON THAT? CAN YOU --

MS. WILSON: I BELIEVE THE VIDEOTAPE WENT BACK WITH THEM. IF THEY CAN GET IT OUT --

THE COURT: WE NEED THE GET THE TRANSCRIPTS ALSO.

MR. MOORE: WE ARE PLAYING THE VIDEOTAPE FIRST, WE WILL PUT THE VIDEOTAPE TRANSCRIPTS OUT FIRST.

THE COURT: I THINK I GIVE ANOTHER BRIEF CAUTIONARY